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No. 02-135

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, et al.
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON CONDITIONAL CROSS-APPEAL
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OPPOSING MOTION TO DISMISS IN CONDITIONAL CROSS-APPEAL

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INTRODUCTION

Pursuant to Supreme Court Rule 18.8, Cross-Appellants Jubelirer and Ryan ("Presiding Officers") file this Brief in Opposition to the Motion to Dismiss the Conditional Cross-Appeal submitted by Richard Vieth, et. al (Cross-Appellees herein and Plaintiffs below).

ARGUMENT

I. Partisan Gerrymandering

Protesting that the justiciability of partisan gerrymandering claims has been "long-settled," the Vieth Cross-Appellees urge this Court not to revisit that issue. Motion to Dismiss at 3. It is, however, beyond question that a litigant may advocate in favor of a change in the law. If one party's characterization of an issue as "long-settled" could prevent this Court from reconsidering prior decisions in light of time and experience, important rulings such as *Brown v. Board of Education*, 347 U.S. 483 (1954), would never have occurred.

Presiding Officers, moreover, have provided a basis for the Court to reconsider its justiciability ruling in *Davis v. Bandemer*, 478 U.S. 109 (1986). This case represents the incarnation of all the fears enunciated by Justice O'Connor in her *Bandemer* concurrence and underscores why partisan gerrymandering claims should be nonjusticiable. The political party which lost its bid in the congressional redistricting battle in Pennsylvania's General Assembly has simply re-waged the battle in the federal courts. It is appropriate for this Court to contemplate whether a decision of the highest court in the land that facilitates this tactic is advisable.

II. "Identifiable Political Group"

In *Bandemer*, a plurality of this Court saw fit to require a plaintiff to prove the existence of an "identifiable political group" as an element of a partisan gerrymandering claim. *See* 478 U.S. at 127. Numerous lower courts, in addressing such claims, have simply skipped this prong of the test.[1]

While, as the Vieth Cross-Appellees point out, in one case, an appellate court agreed that an allegation that Democrat voters will vote for Republican candidates showed a "sufficient degree of cohesiveness" to satisfy this prong of the analysis, *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n.23 (4th Cir. 1992), at least one other court has expressed a different view. In *Pope v. Blue*, 809 U.S. 392, 396 n.3 (W.D. N.C. 1992) (three-judge court), *aff'd* 506 U.S. 801 (1992), the three-judge court commented:

> Perplexingly ... a substantial minority of the plaintiffs in this case are registered as members of the Democratic Party or as Independents. Inclusion of these plaintiffs substantially detracts from the plaintiffs' status as an 'identifiable group.' In the ensuing papers and at oral argument ... plaintiffs exclusively advanced the theory that their 'identifiable group' consisted of Republican voters. We will assume that the plaintiffs' action is premised on this theory, as it is the only coherent theory on which this litigation could advance.

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[1] Perhaps because the requirement that a plaintiff must show an "actual discriminatory effect" on that group is so difficult to demonstrate that partisan gerrymandering claims, like the one in this case, are frequently defeated on the third prong of the analysis.

And, contrary to the Vieth Cross-Appellees' contention, it is not clear from the *Bandemer* decisions whether the *Bandemer* plaintiffs were registered Democrats or, as here, simply individuals alleging they would vote for Democrat candidates. *See* 603 F. Supp. 1479, 1482 (S.D. Ind. 1984) (three-judge court) (referring to plaintiffs as "citizens of Indiana and members of the Democratic party"); *id.* at 1492 (noting that plaintiffs "align" themselves with the Democrat party); *see also* 478 U.S. at 115 (noting that plaintiffs were "several Indiana Democrats").

The meaning and application of the "identifiable political group" prong of the *Bandemer* analysis is squarely raised in this appeal and should be addressed, should this Court note probable jurisdiction and not summarily affirm.

III. The Cross-Appeal Is Not Improper

The Vieth Cross-Appellees seek to have this conditional cross-appeal dismissed as "unnecessary and improper" because Presiding Officers could have raised their arguments as alternative bases for affirmance. Motion to Dismiss at 1. Presiding Officers' institution of a cross-appeal, however, reflects a conservative approach reasonably dictated by the rules and the case law relevant to direct appeals. As such, dismissal on this basis would be unjust.

Current Supreme Court Rules 18.4 and 18.6, which pertain to direct appeals,[2] do not specify when it is appropriate to raise issues decided favorably to the opposing party below in a conditional cross-appeal as

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[2] In support of dismissal, Vieth Cross-Appellees cite to a discussion in Robert L. Stern, et al., SUPREME COURT PRACTICE §635 [sic] (8th ed. 2002) pertaining to cross-petitions for *certiorari*, not to direct appeals. *See* Motion to Dismiss at 2-3.

opposed to a Motion to Dismiss or Affirm. Prior to 1990, Supreme Court Rule 16.1(d) provided that the Court "would receive a motion to dismiss or affirm 'on any other ground that the appellee wishes to present as a reason why the Court should not set the case for argument.'" Stern, SUPREME COURT PRACTICE §7.11 at 487 (quoting former Rule 16.1(d)). Supreme Court Rule 10.5 provided: "The Court may permit an appellee, without filing a cross-appeal, to defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted." 28 U.S.C.A. (1984 bound volume). The evolution of the rules suggests that Presiding Officers *could have* urged the issues raised in their conditional cross-appeal as alternative basis for affirmance. The rules do not, however, suggest that such was the *only* way to present those issues to the Court.

The cases and commentary that have grown up around direct appeals undermine any certainty that a cross-appeal was unnecessary. *See Swarb v. Lennox*, 405 U.S. 191, 201 (1972) ("In the absence of a cross-appeal, the opposition is in no position to attack those portions of the District Court's judgment that are favorable to plaintiff-appellants"); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 157-58 & n.8 (1971) ("No cross-appeal has been taken from this partial grant of the requested injunction. We therefore have no occasion to consider whether the District Court's action was correct"); *Roemer v. Board of Public Works*, 426 U.S. 736, 756 n.20 (1976) ("There being no cross-appeal from the District Court judgment, this aspect of its ruling is not before us"); Wright, Miller & Cooper, 17 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D §4040, at 157 (1988 & 2002 Supp.) ("There has been *a start* at recognizing ordinary cross-appeal doctrine, by requiring a cross-appeal to seek affirmative relief from the judgment below but allowing without cross-appeal any argument advanced to support the judgment") (footnote omitted, emphasis added).

With this in mind, Presiding Officers elected to file a conditional cross-appeal to ensure their challenges were before the Court. Notably, they also cross-referenced the same two issues in the Motion to Dismiss or Affirm filed in response to the Jurisdictional Statement in Appeal No. 01-1873 and urged the Court to consolidate the appeal and cross-appeal should it entertain the appeal. *See* Motion to Dismiss or Affirm in No. 01-1873 at 9-10 n.6. An appellant should not be punished for this type of "belt and suspenders" approach. Even if the cross-appeal was technically unnecessary, it was not "improper" and should not be dismissed for that reason. The Vieth Cross-Appellees cite nothing to support their request for dismissal and treatment by this Court in other cases does not support dismissal. *See Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981) (where defendant filed direct appeal from three-judge court ruling finding state act unconstitutional and plaintiffs filed cross-appeal from the three-judge court's rejection of their alternative Commerce Clause challenge, this Court noted probable jurisdiction and consolidated the appeals).

CONCLUSION

For the foregoing reasons, in addition to those set forth in Cross-Appellants Jubelirer and Ryan's Jurisdictional Statement on Conditional Cross-Appeal, this Court should note probable jurisdiction of the cross-appeal and proceed to address the merits of the questions presented.

Respectfully submitted,

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